Supreme Court, U.S.
FILED
FEB 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-916

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

WINSTON A. MITCHELL, M.D.;
WINSTON A. MITCHELL, M.D., INC.,
Petitioners

vs.

FRANK R. HOWARD MEMORIAL HOSPITAL;
ROBERT HARRAH; STEVEN WENTWORTH, M.D.,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	Page
ARGUMENT	1
CONCLUSION	4

TABLE OF AUTHORITIES

Furlong v. Long Island College Hospital, 710 F2d 922 (2nd Cir. 1983)	3
McLain v. Real Estate Board of New Orleans, 444 US 232 (1980)	3
Oltz v. St. Peter's Community Hospital, 816 F2d 1440 (1988)	2
APPENDIX — Ninth Circuit Decision in Oltz v. St. Peter's Community Hospital	A-1

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PETITIONER'S REPLY BRIEF

ARGUMENT

Respondents proffer a novel theory in anti-trust interstate commerce jurisdiction, one which the Ninth Circuit seems to have adopted. While paying lip service to the concept that jurisdictional determinations must be grounded in a "broad aggregate of factors", petitioners then urge this Court to conclude that where there are an aggregate of factors, each of them must independently meet the test of having a not insubstantial effect on interstate commerce or have the entire matter fail for lack of jurisdiction.

The adoption of this test would virtually preclude every hospital in the United States that was not located adjacent to a state border, or which did not have a significant

tertiary care practice that would attract patients from other states, from recourse to Federal anti-trust protection.

To permit this analysis to stand as the rule of law for determining jurisdiction would be to effectively bar most hospitals in the United States from being subject to Federal anti-trust scrutiny, whether by private litigants or Federal enforcement agencies.

The threat of the Ninth Circuit's decision in this case to the availability of Federal jurisdiction over hospital anti-competitive behavior is no clearer shown than in the recent Ninth Circuit decision in *Oltz v. St. Peter's Community Hospital,* 816 F2d 1440 (1988). In *Oltz,* the Ninth Circuit affirmed a district court decision which found anti-competitive behavior involving the exclusion of nurse anesthetists from providing anesthesia services by a conspiracy of the medical staff and the hospital to bar the nurse anesthetists in an effort to eliminate competition with physician anesthesiologists.

The *Oltz* decision is not one which, petitioners respectfully submit, could be considered one "based on inherently local disputes over terms and conditions of health care delivery" as respondents like to characterize physician-hospital anti-trust disputes. Rather it is one affecting the very nature of the right to compete in the market for the delivery of health care. The *Oltz* decision was rendered by a panel in the Ninth Circuit different than that which rendered the opinion in the instant case. Seizing on the decision in the instant case which apparently bars access to Federal anti-trust protection for rural hospitals, the defendants in *Oltz* have petitioned for an En Banc hearing to overturn the Ninth Circuit's decision in that case based solely on the Ninth Circuit's ruling in the

instant case. (Copy of petition annexed hereto as Exhibit A).

Petitioners are at a loss to provide any clearer evidence of the split within the Ninth Circuit itself or the threat to Federal enforcement of anti-trust laws to protect free and open competition for the delivery of health care services in the United States than the *Oltz* case and the current attempt by the unsuccessful defendants in that case to sweep away the determination of a district court and the Ninth Circuit by the invocation of the Ninth Circuit's sweeping rule in the instant case barring rural hospital access to Federal courts.

Finally, respondents conclusion that the circuits are not split as to the essential extent of jurisdiction under the Sherman Act is highly misleading. Invoking this Court's decision in *McLain v. Real Estate Board of New Orleans*, 444 US 232 (1980), respondent's cite this Court to a series of cases from the Seventh, Sixth and Second Circuits[1] which advocate an interpretation of *McLain* which has been, heretofore, rejected by the Ninth Circuit. Respondent's attempt to harmonize the split in the Circuits serves, rather, to highlight the distinction.

---

[1]Most notably *Furlong v Long Island College Hospital*, 710 F2d 922 (2nd Cir. 1983).

CONCLUSION

For the reasons discussed above, respondents respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TAFFORD E. OLTZ,
Plaintiff-Appellee,
v.
ST. PETER'S COMMUNITY HOSPITAL,
Defendant-Appellant.

Petition of St. Peter's Community Hospital for Rehearing and Suggestion for En Banc Hearing Under F.R.A.P. Rules 40 and 35(b)

Case Nos. 87-3944
87-3945
DC No. CV-81-271-H-RES

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TABLE OF CONTENTS

Page

POINTS OF LAW AND FACT A-7

A. THE COURT LACKS JURISDICTION UNDER *MITCHELL* A-7

B. THERE IS NO PROOF OF A SIGNIFICANT ADVERSE IMPACT ON INTERSTATE COMMERCE UNDER *KAPLAN v. BURROUGHS CORP.* A-7

C. THE DECISION CONFLICTS WITH SUPREME COURT AND CIRCUIT RULINGS ON THE RELEVANT MARKET A-7

STATEMENT OF THE CASE A-8

ARGUMENT A-9

I

CONFLICTS WITHIN THE CIRCUIT REQUIRE REHEARING OF THIS CASE A-9

A. St. Peter's Has Insufficient Relation To Interstate Commerce To Justify Sherman Act Jurisdiction A-9

1. The *Mitchell* Case Requires A Finding Of No Jurisdiction A-9

a. The *Mitchell* Precedent A-9

b. The *St. Peter's* Facts A-10

TABLE OF CONTENTS

Page

2. Even If There Were Jurisdiction, The Liability Decision Conflicts with a Circuit Rule That Activities Must Have a Substantial Impact on Interstate Commerce to Impose Sherman Act Liability A-11
   a. The *Kaplan* Precedent A-11
   b. The *St. Peter's* Facts A-12
3. The Panel's Treatment of Relevant Market and the Rule of Reason Analysis Results in a Per Se Rule for Local, Small-Town Hospitals A-13
   a. The Per Se Effect of the Decision A-13

II

EN BANC CONSIDERATION OF THE CASE IS JUSTIFIED BY THE DIVISION AMONG CIRCUITS AND CONFLICT WITH THE SUPREME COURT CREATED BY THE *ST. PETER'S* DECISION A-14

1. The "Relevant Market" Analysis in the Panel Decision Contradicts Supreme Court and Other Circuit Decisions A-14
   a. The *Jefferson Parish* Decision Does Not Support the *St. Peter's* Decision A-14
   b. The Panel Improperly Analyzed the Relevant Market A-15
   c. The *St. Peter's* Decision A-16
   d. Seventh Circuit Precedent A-17

TABLE OF CONTENTS

Page

e. Fourth Circuit Precedent A-17

f. Other Circuit and District Court Precedent A-18

g. The *St. Peter's* Decision A-19

CONCLUSION A-20

MAILING CERTIFICATE A-21

APPENDIX

Mitchell v. Frank R. Howard Memorial Hospital, 853 F.2d 762 (9th Cir. 1988) A-7, A-10

Kaplan v. Burroughs Corp., 611 F.2d 286 (9th Cir. 1979) A-7, A-11, A-16

Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) A-7, A-13, A-14, A-16

Drs. Steuer & Latham PA v. Nat. Med. Ent., (unpublished dec. 4th Cir. 1988) A-8, A-18

Map

TABLE OF CASES

Cases

Page

Capili v. Shott, 620 F.2d 438 (4th Cir. 1980) A-18

Collins v. Associated Pathologists, Ltd., 844 F.2d 473 (7th Cir. 1988), *cert. petition filed*, (July, 1988) A-8, A-17

Dos Santos v. Columbus-Cuneo-Cabrini Medical Center, 684 F.2d 1346 (7th Cir. 1982) A-17

Drs. Steuer & Latham PA v. Nat. Med. Ent., (unpublished dec. 4th Cir. 1988), *aff'g*, 672 F.Supp. 1489 (D.S.C. 1987) A-8, A-18

Ezpeleta v. Sisters of Mercy Health Corp., 800 F.2d 119 (7th Cir. 1984) A-17

F.T.C. v. Indiana Fed's of Dentists, 476 U.S. 477 (1986) A-13

Gonzales v. Insignares, 1985-2 Trade Cases, ¶ 65, 701 (N.D. Ga. 1985) A-18

Harkins Amusement Enters., Inc. v. General Cinema Corp., 850 F.2d 477 (9th Cir. 1988) A-13

Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (1976)..... A-11

Konik v. Champlain Valley Physicians Hospital Medical Center, 733 F.2d 1007 (2d Cir.), *cert. denied*, 460 U.S. 884 (1984)..... A-18

Rockland Physicians Association, P.C. v. Grodin, 616 F.Supp. 945 (S.D.N.Y. 1986)..... A-18

Tafford E. Oltz v. St. Peter's Community Hospital, Slip Opinion (9th Cir. Nov. 28, 1988) A-8

TABLE OF CASES

CASES

Page

Wright v. Southern Mono Hospital District, 631 F. Supp. 1294 (E.D.Cal. 1986) A-18

PETITION OF ST. PETER'S COMMUNITY HOSPITAL FOR REHEARING AND SUGGESTION FOR EN BANC HEARING UNDER F.R.A.P. RULES 40 AND 35(b)

POINTS OF LAW AND FACT

A. THE COURT LACKS JURISDICTION UNDER MITCHELL.

The panel exercised jurisdiction over St. Peter's Community Hospital ("St. Peter's") without a proper factual basis in direct conflict with a recent decision by a different panel of the Circuit. *Mitchell v. Frank R. Howard Memorial Hosp.*, 853 F.2d 762 (9th Cir. 1988), *cert. petition filed*, (Dec. 1988) (Appendix ["App."] 25).

B. THERE IS NO PROOF OF A SIGNIFICANT ADVERSE IMPACT ON INTERSTATE COMMERCE UNDER KAPLAN v. BURROUGHS CORP.

The *St. Peter's* decision (App. 1) directly conflicts with the well-settled principle that plaintiff in a Sherman Act case must prove a "not insignificant adverse impact" on interstate commerce in the relevant market. *Kaplan v. Burroughs Corp.*, 611 F.2d 286 (9th Cir. 1979) (App. 31). *See also Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) (App. 42). No such impact on the market for providers of anesthesia services (not a general hospital market) has been shown.

C. THE DECISION CONFLICTS WITH SUPREME COURT AND OTHER CIRCUIT RULINGS ON THE RELEVANT MARKET.

The *St. Peter's* decision, by using a hospital or patient market rather than the market in which anesthesia providers compete for jobs, directly contradicts decisions by the United States Supreme Court and the Seventh Circuit.

Jefferson Parish Hospital Dist. No. 2 v. Hyde, supra, 466 U.S. 2 (1984); *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473 (7th Cir. 1988), *cert. petition filed*, (July 1988). The *St. Peter's* decision is the only decision research has yielded in which an exclusive hospital contract with medical service providers has been struck down. *See Jefferson Parish, supra*; *Collins, supra*; *Drs. Steuer & Latham PA v. Nat. Med. Ent.*, (unpublished dec. 4th Cir. 1988), *aff'g.*, 672 F.Supp. 1489 (D.S.C. 1987) (App. 88). These striking conflicts justify rehearing en banc.

STATEMENT OF THE CASE

St. Peter's is the only hospital offering a full range of services in Helena, "one of Montana's smaller cities." (Slip Opinion ["Sl.Op."] at 14554, App. 1). Helena has a population of 24,800. St. Peter's is located 90 miles from Great Falls, 95 miles from Bozeman, 64 miles from Butte, 115 miles from Missoula, 224 miles from Billings and 172 miles from Yellowstone National Park. State and Canadian borders lie beyond those distances.*

The case arises from St. Peter's decisions to create a Department of Anesthesia staffed by M.D. anesthesiologists, to enter an exclusive contract with anesthesiologists to staff the department and provide anesthesia services at the hospital and to terminate a month-to-month billing agreement (but not hospital privileges) with Tafford E. Oltz, a certified registered nurse anesthetist ("CRNA").

---

*Pursuant to Rule 201 of the Federal Rules of Evidence, the Court is invited to take notice of these geographic and demographic facts, some of which are in the record. A map showing the location of hospitals within 115 miles of St. Peter's is appended at App. 94. The map is not part of the record. Ninety percent of St. Peter's patients come from its home county, Lewis and Clark, and from the northern portion of Jefferson County.

The anesthesiologists offered Mr. Oltz a job. However, he would have been supervised by anesthesiologists rather than attending physicians. Mr. Oltz refused, moved from Montana and became chief nurse anesthetist at a regional medical center associated with the University of Iowa.

Alleging Sherman Act §§ 1 and 2, civil rights and pendent state law claims, Mr. Oltz sued St. Peter's and the anesthesiologists. The anesthesiologists settled before trial. The civil rights, state law and Sherman Act § 2 claims against St. Peter's were dismissed on its motion for summary judgment before trial. After trial and a jury verdict for the plaintiff on the Sherman Act § 1 claim, the trial court denied St. Peter's motion for judgment n.o.v. or for a new trial, entering judgment of liability, but *sua sponte* granted a new trial with respect to damages. The case was certified for interlocutory appeal on questions of liability and for cross-appeal on the order for a new trial on damages. This Court (per Hug, J. with Wright and Wallace, JJ.) affirmed both the finding of liability and the order for a new trial on damages on November 28, 1988.

ARGUMENT

I

CONFLICTS WITHIN THE CIRCUIT REQUIRE REHEARING OF THIS CASE

A. St. Peter's Has Insufficient Relation to Interstate Commerce To Justify Sherman Act Jurisdiction.

1. The *Mitchell* Case requires a Finding of No Jurisdiction.

a. *The Mitchell Precedent.* On August 8, 1988, this Court (per Norris, J. with Goodwin, C. J. and Choy, J.)

held that a rural hospital's exclusive contract with a radiologist had insufficient impact on interstate commerce to trigger Sherman Act jurisdiction. *Mitchell v. Frank R. Howard Memorial Hosp., supra*, 853 F.2d 762 (9th Cir.), *cert. petition filed*, (1988) (App. 25.)

The trial court entered judgment for the hospital, rejecting Dr. Mitchell's contention that jursidiction arose because the hospital received substantial revenues from out-of-state public and private sources and purchased an unknown amount of medical supplies from out-of-state sources. *Id.* at 763. This Court affirmed, quoting the District Court's language that:

> determinations of [Sherman Act] jurisdiction in [hospital cases] are based not merely upon revenue figures, but on a broad aggregate of factors including proximity of the facility to regional centers of commerce or to other states, treatment of significant numbers of out-of-state patients, purchase of equipment and supplies from interstate sources and interstate transfer of payment for patient care. *Id.* at 764.

Jurisdiction is a "highly fact based question calling for common sense judgment." *Id.* The plaintiff has the burden to make a sufficient factual showing to invoke jurisdiction.

b. *The St. Peter's Facts.* The *St. Peter's* panel did not discuss jurisdiction, but assumed without deciding that the Sherman Act is applicable to a small-town hospital isolated from any major urban area. Like the hospital in *Mitchell*, St. Peter's obtains some payments from non-Montana private and public sources, but the record fails to show the amounts, if any, of supplies purchased outside the state or the numbers, if any, of non-Montanans who have ever been treated there. In practical economic terms, St. Peter's is a local community hospital that serves

Helena and its rural environs. There are insufficient factual underpinnings to uphold Sherman Act jurisdiction under *Mitchell* and the cases cited therein.

The panel's decision on liability must be reversed and brought into harmony with *Mitchell* because this Court lacks jurisdiction to apply the Sherman Act to St. Peter's.*

2. Even If There Were Jurisdiction, The Liability Decision Conflicts with a Circuit Rule That Activities Must Have a Substantial Impact on Interstate Commerce to Impose *Sherman Act Liability.*

The panel decision conflicts with prior decisions of this Circuit requiring proof of a "not insignificant adverse impact" on interstate commerce before Sherman Act liability is imposed.

a. *The Kaplan Precedent.* In *Kaplan v. Burroughs, supra,* 611 F.2d 286, 291 (9th Cir. 1979), this Circuit held:

> Proof that the defendant's activities had an impact upon competition in a relevant market is an *absolutely essential element* of the rule of reason case. It is the impact upon competitive conditions in a definable product market which distinguishes the antitrust violations from the ordinary business tort. (Emphasis added.)

St. Peter's submits that the panel's decision fails to show any actual injury to competition.

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*St. Peter's contested jurisdiction before the trial court (Tr. Vol. I at 36-37), but its contention was denied. On appeal, it questioned jurisdiction because no evidence establishes a required nexus with interstate commerce. *See Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 743 (1976). (St. Peter's opening Brief on Appeal at 2)

b. *The St. Peter's Facts.* After rejecting the anesthesiologists' offer, Mr. Oltz advertised in a nationally distributed CRNA journal. He got responses from Washington, Oregon, Iowa and Ohio before accepting a job in the Virgin Islands. He later moved to Iowa where he obtained an academic and practitioner's position as chief nurse anesthetist with a regional medical center affiliated with a university. His wife, who is also a CRNA, found employment at the same medical center. His expert testified that once a CRNA is certified in one state, the certification is virtually universally honored throughout the United States and that the market is national in scope.

The question whether Mr. Oltz suffered any financial loss is open because, according to the panel, he had "juggled" his income and expenses, justifying a new trial with respect to damages. (St. Peter's submits that the evidence will show that Mr. Oltz and his wife earn more now than they could possibly have made by staying at St. Peter's and that they have suffered no losses.) St. Peter's received applications for its anesthesia staff from eight states.

The evidence shows a free flow of both anesthesiologists and anesthetists, but no adverse impact upon interstate commerce. Anesthesia services are available nationally, and those who are practitioners in anesthesia both compete and practice nationally. Terminating Mr. Oltz's billing contract had no impact on the market for providers of anesthesia. As Justice O'Connor has observed:

> Exclusive dealing is an unreasonable restraint on trade *only* when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal. When the sellers of services are numerous and mobile, and the number of buyers is large, exclusive-

> dealing arrangements of narrow scope pose no threat of adverse economic consequences.

Jefferson Parish, supra, 466 U.S. at 45, emphasis added (O'Connor, J., concurring).

The evidence in this case fails to meet the "not insignificant adverse impact" standard of *Kaplan*. This Circuit, by disregarding *Kaplan* in the *St. Peter's* decision, has apparently adopted a new standard of Sherman Act liability that fails Supreme Court standards. (*See infra,* pp. 9 *et seq.*)

3. The Panel's Treatment of Relevant Market and the Rule of Reason Analysis Results in a Per Se Rule for All Local, Small-Town Hospitals.

a. *The Per Se Effect of the Decision.* Although the Panel decision purports to reject a per se holding in favor of a rule of reason analysis (Sl. Op. at 14559 n.1), the decision in effect creates a per se violation for any isolated local or rural hospital which enters into an exclusive contract.

Although the *St. Peter's* panel cautions against enlarging the "boycott's pigeon hole" (*F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 477 (1986)), recognizes that it should hesitate to apply the boycott per se rule when the economic impact of an arrangement is not obvious, (*Harkins Amusement Enters., Inc. v. General Cinema Corp.*, 850 F.2d 477 (9th Cir. 1988)), and "decline[s] the invitation to invoke per se analysis in this case," (Sl. Op. at 14559 n.1), the decision finds the patient market in Helena, Montana, as the relevant market for assessing antitrust impact, thus making it virtually automatic or "per se" that sole hospitals in small cities or rural areas will face antitrust liability if they enter into an exclusive agreement with medical service providers. The panel's only response to its grave expansion of per se categories is to

label the problem as "overstated" and to encourage a case-by-case analysis. The *Mitchell* decision is totally to the contrary.

II

EN BANC CONSIDERATION OF THE CASE IS JUSTIFIED BY THE DIVISION AMONG CIRCUITS AND CONFLICT WITH THE SUPREME COURT CREATED BY THE ST. PETER'S DECISION

1. The "Relevant Market" Analysis in the Panel Decision Contradicts Supreme Court and Other Circuit Court Decisions.

The *St. Peter's* decision is the only reported decision research reveals in which a hospital's exclusive agreement with medical providers has yielded Sherman Act § 1 liability. Unlike a decision of the Supreme Court and reported decisions in other Circuits, the *St. Peter's* decision ignores the market for medical service providers and fails to recognize the significant justifications for exclusive hospital contracts.

a. The *Jefferson Parish* Decision Does Not Support the *St. Peter's* Decision. In *Jefferson Parish*, the United States Supreme Court upheld a hospital's exclusive contract with a group of anesthesiologists, even though the contract excluded an anesthesiologist from providing services at the hospital. In analyzing the relevant market, the majority opinion held:

> That burden necessarily involves an inquiry into the actual effect of the exclusive contract on competition among anesthesiologists .... The market is not necessarily the same as the market in which hospitals compete in offering services to patients. ...

Jefferson Parish, *supra*, 466 U.S. at 29.

Moreover, to establish a claim, the plaintiff must prove (as this Court had earlier held in *Kaplan*) an actual adverse effect on competition. The Supreme Court stated:

> Without a showing of *actual adverse effect on competition,* respondent cannot make out a case under the antitrust laws, and no such showing has been made.

Id. at 31, emphasis added.

The Jefferson Parish hospital's failure to grant privileges to a single anesthesiologist because of its exclusive anesthesiology contract with a particular group neither invalidated the exclusive agreement nor established antitrust injury. The majority stated:

> But there has been no showing that the market as a whole has been affected at all by the contract.... There is simply no showing here of the kind of restraint on competition that is prohibited by the Sherman Act.

Id. at 31, 32.

Concurring, Justice O'Connor indicated that the market scope is providers, not hospital services. She stated:

> Such an arrangement, which has little anti-competitive effect and achieves substantial benefits in the provision of care to patients, is hardly one that the antitrust law should condemn.

Id. at 44.

b. *The Panel Improperly Analyzed the Relevant Market.* Despite *Jefferson Parish* and this Circuit's settled precedent, the *St. Peter's* panel has made an incorrect relevant market analysis. In *Kaplan,* this Circuit stated that:

> Failure to produce substantial evidence proving a relevant market and an injury to competition within

> that market entitles a defendant in a rule of reason case to judgment n.o.v. . . . Familiar principles guide our search of the record below for evidence of proof of market definition and competitive impact. Even if sufficient proof of intent and causation are introduced, the *elimination of a single competitor, standing alone, does not prove anticompetitive effect.* . . . Impact upon the market must be proven by reference to definitions of both the relevant geographic market and the relevant product market.

Kaplan, supra, 611 F.2d at 291, emphasis added.

c. *The St. Peter's Decision.* In contrast to both *Jefferson Parish* and *Kaplan,* the *St. Peter's* decision relegates the relevant market concept to a "tool" of analysis only. The panel ignored the only evidence of market in the record: evidence which shows that the relevant market is the national market in which providers of anesthesia services compete, not a hospital or patient market. Mr. Oltz, a provider of anesthesia services, received responses to his advertisement from four states and a territory. Providers of anesthesia services from eight different states sought positions with St. Peter's. The impact of the termination of Mr. Oltz's exclusive billing arrangement created hardly a ripple, let alone a splash, in the national marketplace of anesthesia providers.

After determining that the relevant market is the patient market in Helena, not the market in which providers of anesthesia services compete, the *St. Peter's* decision states:

> Accordingly, we conclude that anesthesia services [not providers] and the Helena area framed the appropriate product market and geographic compo-

> nents of a relevant market in which the jury could assess injury to competition. (Sl. Op. at 14563)

In the guise of an assessment of the Helena patient market, the panel has ignored the fact that it was dealing with actions which might have had an adverse impact on one person only, the claimant (whose damages are uncertain), and has ignored the undisputed factual record showing the existence of a national market for providers of anesthesia services which was not adversely affected in any way whatsoever. *Jefferson Parish* and *Kaplan* do not support such a determination.

d. *Seventh Circuit Precedent.* In *Collins v. Associated Pathologists, Ltd., supra* 844 F.2d 473 (7th Cir. 1988), the Seventh Circuit held that *pathologists,* not their services, constitute the relevant market for analyzing the impact of an exclusive contract between a hospital and a group of pathologists. The hospital's exclusive agreement had no substantial anticompetitive effect upon the market in which pathologists compete for jobs.

The Seventh Circuit has also determined that an anesthesiologist cannot maintain an antitrust action against a hospital for denying him staff privileges on the basis of a reviewing board's medical judgment and the hospital's decision to grant an exclusive contract to another practitioner. *Ezpeleta v. Sisters of Mercy Health Corp.,* 800 F.2d 119 (7th Cir. 1984). *See also Dos Santos v. Columbus-Cuneo-Cabrini Medical Center,* 684 F.2d 1346 (7th Cir. 1982).

e. *Fourth Circuit Precedent.* In an unpublished decision dated May 10, 1988, the Fourth Circuit affirmed a district court decision that an exclusive contract between a hospital and a group of pathologists did not substan-

tially impair the market for the supply of pathology services and was not illegal under the Sherman Act. *Drs. Steuer and Latham, PA v. Nat. Med. Ent.,* (unpublished dec. 4th Cir. 1988), *aff'g,* 672 F.Supp. 1489 (D.S.C. 1987) (App. 88). The Circuit affirmed on the basis of the district court's reasoning.

The Fourth Circuit had earlier concluded that a defendant hospital's entry into an exclusive contract for anesthesiology services was reasonable and justified by community and hospital needs. *Capili v. Shott,* 620 F.2d 438 (4th Cir. 1980).

f. *Other Circuit and District Court Precedent.* In *Konik v. Champlain Valley Physicians Hospital Medical Center,* 733 F.2d 1007 (2d Cir.), *cert. denied,* 460 U.S. 884 (1984), the Second Circuit held that a hospital may legitimately control the number and identity of anesthesiologists who receive staff privileges. In *Wright v. Southern Mono Hospital District,* 631 F.Supp. 1294 (E.D. Cal. 1986), the Eastern District of California recognized that legitimate business reasons justified exclusive contracts to provide anesthesiology services at a hospital. The Southern District of New York reached a similar conclusion justifying exclusive contracts for anesthesiology services in *Rockland Physicians Association, P.C. v. Grodin,* 616 F.Supp. 945 (S.D.N.Y. 1986). *See also Gonzales v. Insignares,* 1985-2 Trade Cases, ¶65,701 (N.D. Ga. 1985). Commenting on the exclusive anesthesia contract in *Jefferson Parish,* Justic O'Connor wrote:

> Plainly, however, the arrangement forecloses only a small fraction of the markets in which anesthesiologists may sell their services, and a still smaller fraction of the market in which hospitals may secure

anesthesiological services. The contract therefore survives scrutiny under the rule of reason.

Jefferson Parish, supra, 466 U.S. at 46-47.

g. *The St. Peter's Decision.* Although the *St. Peter's* panel attempted to distinguish its decision from the *Collins* case upon the argument that there was no showing of patient preference for particular practitioners in *Collins*, the panel failed to resolve the actual conflict with *Collins* over the relevant market or the conflicts with other Circuits and other courts created by the panel's imposition of liability upon St. Peter's because of its exclusive contract with the anesthesiologists. The glaring division between the *St. Peter's* decision and cited decisions in other Circuits calls for rehearing en banc.

CONCLUSION

Because of conflicts with prior decisions within this Circuit, St. Peter's respectfully petitions the Court for rehearing. Because of the divisions among Circuits and the Supreme Court, St. Peter's suggests that a hearing en banc should be granted.

Dated: December 9, 1988

Respectfully submitted,

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MAILING CERTIFICATE

I, M. Karlynn Hinman, hereby certify that on this 9th day of December, 1988, I mailed true and correct copies of the foregoing Petition of St. Peter's Community Hospital for Renearing with Suggestion for Rehearing En Banc Under F.R.A.P. Rules 35(b), postage prepaid, to:

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M. Karlynn Hinman

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On February 10, 1989, I served the within Petitioner's Reply Brief in re: "Winston A. Mitchell, M.D. v. Frank R. Howard Memorial Hospital" in the United States Supreme Court, October Term 1988, No. 88-916;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

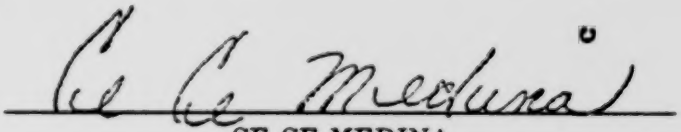
Theodore A. Kolb, Esq.
Sullivan, Roche & Johnson
220 Bush Street, 20th Floor
San Francisco, CA 94104

Robert L. Rusky, Esq.
Hanson Bridgett, Marcus,
Vlahos & Rudy
333 Market Street, Suite 2300
San Francisco, CA 94105

All Parties required to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on February 10, 1989, at Los Angeles, California



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